STATE OF MICHIGAN

COURT OF APPEALS

CHASE EQUIPMENT LEASING INC, Successor in interest to NATIONAL BANK OF DETROIT, Plaintiff-Appellee,	UNPUBLISHED February 13, 2007
v	No. 272281 Court of Claims
DEPARTMENT OF TREASURY, Defendant-Appellant.	LC No. 04-000238-MT

Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Defendant Department of Treasury appeals as of right the court of claims' order granting plaintiff Chase Equipment Leasing, Inc. summary disposition under MCR 2.116(C)(10). This case arises out of plaintiff's action seeking a tax refund for sales and use taxes assessed by the Department during the tax period beginning on October 1, 1994, and ending on October 31, 1998. We affirm.

I. Basic Facts And Procedural History

A. Stipulated Facts

During the proceedings below, the parties stipulated to the following facts pursuant to MCR 2.116(A):

> 1. Chase Equipment Leasing Inc. is the successor in interest to National Bank of Detroit ("NBD").
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> 2. During the years in issue, NBD was a Delaware corporation operating as a financial institution domiciled in the State of Michigan and licensed to engage in the business of a financial institution in the State of Michigan and, during the time period relevant to this controversy, conducted business within the State of Michigan.
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> 3. Defendant Department of Treasury, State of Michigan is the statutorily designated agency of the State government charged with responsibility for

collection of the Michigan Sales Tax Act, 1933 PA 167; MCL 206.51, *et seq*. ("STA") and the Use Tax Act, 1937 PA 94; MCL 206.91, *et seq*. ("UTA").

4. The taxes in controversy in this case are sales and use taxes paid by Plaintiff for the tax period beginning on October 1, 1994 and ending on October 31, 1998 (the "years in issue").

5. During the years in issue, NBD entered into agreements with equipment lessors.

6. Attached as Joint Exhibits 1 through 4 are example agreements which the Parties agree are representative of the agreements at issue and may be used by the Court in order to make its determinations in this case:

7. The Michigan Department of Treasury audited the Taxpayer for the tax period from October 1, 1994 through October 31, 1998 (See copy of the Sales Tax Audit attached as Exhibit 1 and a copy of the Use Tax Audit attached as Exhibit 2 to Joint Exhibit 5);

8. On September 23, 2004, the Department issued Bill for Taxes Due (Final Assessment) L426982 (the "Use Tax Assessment"), assessing use tax in the amount of $1,590,032 with interest of $1,070,582.03 for the years in issue, for a total amount due of $2,660,614.03.

9. On September 27, 2004, the Department issued a Bill for Taxes Due (Final Assessment) L426981 (the "Sales Tax Assessment"), assessing sales tax in the amount of $774,750 with interest of $480,447.64 for the years in issue, for a total amount due of $1,255,197.64.

10. Plaintiff paid under protest the purported Use Tax Assessment and the Sales Tax Assessment and filed this action for refund.

B. Procedural History

In December 2004, Chase filed this action in the court of claims against the Department, seeking to recover a refund of the sales and use taxes paid, plus statutory interest, costs, and attorney fees. According to Chase, it secured repayment of loans to equipment lessors by taking a security interest in the equipment that was subject to the lease. Chase explained that its written agreements with the equipment lessors did not operate to transfer title to the leased equipment to it but made clear that the equipment lessor remained the sole owner of the leased equipment. Therefore, Chase alleged that it did not own, use, or sell the leased equipment and was, therefore, not liable for sales or use tax.

After the parties agreed on the above stipulated facts, Chase moved for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact

that its transactions with the equipment lessors did not subject it to sales or use tax. More specifically, Chase argued that it was not subject to use tax because it did not take title to or "use"[1] the leased equipment and that it was not subject to sales tax because its taking of a security interest in the equipment did not constitute a "sale at retail."[2] Chase submitted three affidavits from NBD/Chase employees in support of its motion.

The Department responded to Chase's motion, arguing that the agreements between Chase and the equipment lessors were not "financing agreements," but rather lease assignments. The Department contended that Chase was properly assessed sales tax on leases where the lessee exercised a "buy out" option and sales tax was not collected on the initial sale of the leased personal property. The Department further contended that Chase was properly assessed use tax in light of the transfer of rights pursuant to the assignment. The Department also argued that the affidavits submitted in support of Chase's motion for summary disposition constituted inadmissible hearsay evidence that should be excluded under the parole evidence rule. More specifically, the Department asserted that the affidavits were inadmissible as evidence extrinsic to the fully integrated agreements. The Department opined that the court of claims should ignore the affidavits and, based on the agreements alone, grant summary disposition in the its favor under MCR 2.116(I)(2). Alternatively, the Department argued that, if considered, the affidavits created a genuine issue of material fact that precluded the court from granting summary disposition in Chase's favor. Last, the Department argued that Chase was not entitled to

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[1] During the time period relevant to this appeal "use" was defined as follows:

> [T]he exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given. [MCL 205.92(b).]

[2] During the time period relevant to this appeal, MCL 205.52(1) stated as follows:

> [T]here is levied upon and there shall be collected from all persons engaged in the business of making *sales at retail*, as defined in section 1, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act. [Emphasis added.]

During that same period, section 1, MCL 205.51(1), stated in pertinent part as follows:

> (b) "Sale at retail" means a transaction by which the ownership of tangible personal property is transferred for consideration, if the transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any purpose other than for resale, or for lease, if the rental receipts are taxable under the tax act, . . . in the form of tangible personal property to a person licensed under this act . . . .
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> (d) "Sale at retail" includes a conditional sale, installment lease sale, and other transfer of property if title is retained as security for the purchase price but is intended to be transferred later.

recovery because it failed to meet its burden during the audit of producing records sufficient to support its position that it was not liable for the taxes assessed.

In a separate filing, the Department submitted Objections to Plaintiff's Motion For Summary Disposition, With Exhibits, arguing that Chase's attempt to expand the record to include the previously mentioned affidavits was in violation of the parties' agreement that the court of claims base its decision on the Stipulation Of Facts and attached documents. Chase countered that it was free to submit affidavits and other proofs, as long as they did not contradict the parties' stipulation of facts, and that the Department had failed to show that the facts in the affidavits contradicted the stipulated facts.

In its written opinion, the court of claims concluded that the affidavits were admissible because they did not contradict the stipulated facts. Thus, taking both the stipulated facts and the affidavits into consideration, the court of claims held that Chase was not liable for use tax because there was no evidence that Chase ever took possession of the leased property, nor was there any evidence that Chase "used" the leased equipment. The court of claims concluded that Chase "merely receive[d] payments under the finance-agreements, which [did] not create use tax liability . . . ." With respect to Chase's sales tax liability, the court of claims concluded that there was no evidence that Chase made a sale at retail. Therefore, the court of claims concluded that Chase "was not required to remit sales tax." Accordingly, the court of claims granted summary disposition in Chase's favor, holding that Chase was entitled to a refund of the taxes paid under protest. The Department now appeals.

II. Summary Disposition

A. Standard Of Review

We review de novo the trial court's ruling on a motion for summary disposition.[3] We review for an abuse of discretion a trial court's decision to admit or exclude evidence.[4] We also review for an abuse of discretion a trial court's decision to entertain motions filed after the deadline set forth in its scheduling order.[5]

B. Propriety Of Motion

The Department argues that the court of claims erred by considering Chase's motion for summary disposition because the parties agreed that the case would be decided on the stipulated facts alone and because Chase filed the motion after the time set forth in the court of claims' scheduling order.

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[3] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[4] *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

[5] *Kemerko Clawson LLC v RxIV Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005).

Pursuant to MCR 2.401(B)(2)(a)(ii), a trial court is required to establish times for events the court deems appropriate, including the filing of motions. Accordingly, in an April 12, 2005 scheduling order, the courts of claims' set the deadline for the filing of MCR 2.116 motions as March 1, 2006. On April 27, 2006, the parties entered a stipulation and order, agreeing that a Stipulation Of Facts would be submitted to the court on May 10, 2006. Although, the parties also agreed to submit "trial" briefs, the trial date was removed from the court calendar, the parties having agreed at the pretrial conference hearing that the court could "just rule on the statement of facts submitted." As directed by the April 27th order, the parties timely submitted their Stipulation Of Facts on May 10, 2006.

However, on May 12, 2006, Chase filed its motion for summary disposition. And on May 25, 2006, the court entered an order amending the April 27 order. The order explained that the court conducted a phone conference with the attorneys of record on May 16, 2006. Thus, the Department was provided the opportunity to object and consult with the court regarding the propriety of Chase's untimely motion.[6]

The Department asserts that specific deadlines ordered by the court take precedence over the general rule that (C)(10) motions "may be raised at any time."[7] In *People v Grove*, the Michigan Supreme Court held that the court rules conferred on a court the discretion to decline to entertain actions beyond the agreed time frame.[8] Expanding on that ruling, in *Kemerko Clawson LLC v RxIV Inc*, this Court concluded that the specific provision of MCR 2.401(B)(2)(a)(ii) controls over the more general rule that (C)(10) motions may be filed at any time. This Court reasoned that to hold otherwise would "effectively construe the reference to motions in MCR 2.401(B)(2)(a)(ii) out of existence, and, thereby, severely curtail the trial court's ability to manage its docket through the use of scheduling orders."[9] These rulings have the effect of endorsing a court's decision to enforce its deadlines in furtherance of efficient case management. These rulings do not, however, eliminate trial courts' authority and discretion to manage dockets. Courts are afforded the "flexibility to exercise their discretion appropriately, given the circumstances of an individual case,"[10] and the Department offers no authority in support of its contention that the court of claims was absolutely required to enforce the scheduling order. Thus, we conclude that the court of claims did not abuse its discretion in allowing Chase to file its motion for summary disposition beyond the scheduling order deadline.

C. Admissibility Of Affidavits

The Department argues that the trial court erred in considering Chase's affidavits in contravention of the stipulation of facts agreed to by the parties. We disagree.

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[6] See MCR 2.401(B)(2)(c)(ii).

[7] MCR 2.116(D)(3).

[8] *People v Grove*, 455 Mich 439, 469; 566 NW2d 547 (1997).

[9] *Kemerko Clawson*, *supra* at 350.

[10] *Grove*, *supra* at 470.

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party bears the initial burden to specifically identify the undisputed factual issues and support its position with supporting documentary evidence.[11] The nonmovant then has the burden of showing that a genuine issue of disputed fact does in fact exist and to produce admissible evidence to establish those disputed facts.[12] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[13] But conjectures, speculations, conclusions, mere allegations or denials, and inadmissible hearsay are not sufficient to create a question of fact for the jury.[14] Where the nonmovant fails to come forward with admissible evidence to establish the existence of a material factual dispute, the motion is properly granted.[15]

The Department first argues that the affidavits were inadmissible extrinsic evidence submitted in violation of the parole evidence rule. That the court of claims did not express an opinion on the merit of this contention does not preclude us from ruling on this issue.[16] And, accordingly, we conclude that the parole evidence rule does not operate to bar admission of the affidavits here. Inclusion of a merger clause—a clause "stating that the writing contains the entire contract and that no representations other than those contained in the writing have been made"[17]—"is a prerequisite to the application of the parol evidence rule."[18] Here, none of the agreements submitted contain such a clause. Although the agreements state that the terms may not be modified except by written agreement, these "no oral modification" clauses cannot be equated with merger clauses.

The Department also argues that "[t]he affidavits submitted directly contradicted the facts submitted to the trial court in the stipulation of facts, by stating that the lease assignments were

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[11] MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

[12] *Meagher v Wayne State Univ*, 222 Mich App 700, 719; 565 NW2d 401 (1997); *Neubacher*, *supra* at 420.

[13] MCR 2.116(G)(4); *Maiden*, *supra* at 120.

[14] *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995); *Neubacher*, *supra* at 420; *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

[15] *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

[16] Appellate consideration of an issue raised before the trial court but not specifically decided by the trial court is not precluded because a party "should not be punished for the omission of the trial court." *Peterman v DNR*, 446 Mich 177, 183; 521 NW2d 499 (1994).

[17] Calamari & Perillo, The Law of Contracts, § 9.21, Disclaimers of Representations; Merger Clauses; "As Is," pp 340-341.

[18] *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 669; 591 NW2d 438 (1998).

'financing agreements.'" However, the stipulation of facts does not speak to the type of the agreements NBD had with the equipment lessors. The stipulation of facts only states that "NBD entered into agreements with equipment lessors" and noted that "example agreements" were attached. Further, the affidavits were not intended as evidence of contract negotiations, or of prior or contemporaneous agreements, by which Chase was attempting to vary or contradict the terms of a clear and unambiguous contract.[19] "[W]ith respect to the nature of . . . contracts, both parol and extrinsic evidence [are] admissible to supplement and explain the agreement."[20] Here, the affidavits simply served to assist the court in discerning the parties' intent by explaining the agreements.[21]

The Department further argues that the affidavits were submitted in direct contravention of the parties' agreement that the case would be decided on the stipulated facts. As justification for its acceptance of the affidavits, the court of claims relied on this Court's holding in *Signature Villas, LLC v Ann Arbor*.[22] The Department suggests that reliance on *Signature Villas* is misplaced here, but we disagree. In that case, this Court explained that, generally, when a case is submitted to a court on stipulated facts, those facts are to be taken as conclusive.[23] But, this Court recognized that this general rule does not mandate that the record is limited to the stipulation.[24] "Where the parties' stipulation is not contradicted, it is within the discretion of the tribunal to permit or consider additional proofs supplementing the same."[25] Thus, as the Department itself recognizes, the *Signature Villas* Court, "found that the evidence submitted *outside* of the stipulated facts did not contradict the stipulated facts[.]"[26] As we explained above, there is nothing in the affidavits that directly contradicts the stipulated facts. Thus, it was not improper for the court of claims to consider the affidavits, despite the parties' stipulation.

In sum, we conclude that the affidavits were admissible and that the court of claims did not abuse its discretion by considering them in granting Chase's motion for summary disposition.

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[19] *Hamade v Sunoco, Inc*, 271 Mich App 145, 166; 721 NW2d 233 (2006).

[20] *Michigan Bean Co v Senn*, 93 Mich App 440, 448; 287 NW2d 257 (1979); see also *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 620; 473 NW2d 652 (1991), quoting *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 367; 320 NW2d 836 (1982) ("'[Michigan] cases establish the principle that extrinsic evidence may be used to supplement**,** but not contradict, the terms of the written agreement.'")

[21] *Whitaker v Citizens Ins Co*, 190 Mich App 436, 439; 476 NW2d 161 (1991).

[22] *Signature Villas, LLC v Ann Arbor*, 269 Mich App 694, 705-707; 714 NW2d 392 (2006).

[23] *Id*. at 706.

[24] *Id*.

[25] *Id*.

[26] (Emphasis in original).

III. Substantive Merits Of The Case

In its brief on appeal, the Department submits a good deal of discussion regarding the substantive merits of this case, i.e., whether Chase should have been subject to the use and sales taxes. However, the Department has not directly challenged those issues in its questions presented. The Department's questions presented are limited to two issues: (1) "May a trial court grant a motion for summary disposition when the moving party presents affidavits which are inadmissible and that contradict its own documentary evidence properly submitted to the court?"; and (2) "Did the trial court properly alter its order and the agreement of the parties on the bases [sic] of an untimely request by one party." Thus, the Department's challenges to the court of claims' ruling on Chase's liability are waived and need not be considered by this Court.[27]

Affirmed.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Bill Schuette

[27] MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).